

Michigan Department of Civil Service

REGULATION

Appointing Authority Letter Reference: CS-6940	Effective Date: March 18, 2001	Index Reference: Alcohol Testing	Regulation Number: 2.08
Issuing Bureau: Executive	Rule Reference: Rule 2-7 (Drug and Alcohol Testing)		Replaces: Reg. 1.06 (CS-6884, Aug. 1, 1998)
Subject: ALCOHOL TESTING			

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1 APPLICABILITY

- 1.1 Executive Agencies.** These regulations apply to all executive agencies of the State of Michigan.
- 1.2 Civil Service Rules.** These regulations apply to alcohol testing conducted under civil service rule 2-7 [Drug and Alcohol Testing]. These regulations are also applicable to employees subject to mandatory Federal testing, as provided in civil service rule 2-7.8.
- 1.3 Collective Bargaining.** These regulations do **not** apply to alcohol testing conducted under the provisions of a collective bargaining agreement approved by the civil service commission, unless otherwise provided in the collective bargaining agreement.
- 1.4 Deviations.** An appointing authority may not deviate from the provisions of these regulations without the written approval of the state personnel director. In requesting approval for a deviation, an appointing authority must petition the director in writing and describe the specific provision or provisions for which a deviation is sought and the rationale for the proposed deviation. The director may approve the request upon a finding of good cause as determined by the director.

2 DEFINITIONS

- 2.1 *Air blank*** means a reading by an EBT of ambient air containing no alcohol. (In EBTs using gas chromatography technology, a reading of the device's internal standard.)

- 2.2 Alcohol** means the intoxicating agent in beverage alcohol, ethyl alcohol, or other low molecular weight alcohols including methyl or isopropyl alcohol.
- 2.3 Alcohol concentration** means the alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by a breath test under this part.
- 2.4 Alcohol use** means the consumption of any beverage, mixture, or preparation, including any medication, containing alcohol.
- 2.5 Breath alcohol technician (BAT)** means an individual who instructs and assists individuals in the alcohol testing process and operates an EBT.
- 2.6 Canceled or invalid test** means a test that is deemed to be invalid under § 3.11. It is neither a positive nor a negative test.
- 2.7 Confirmation (or confirmatory) test** means a second test, following a screening test with a result of **0.02** or greater, that provides quantitative data of alcohol concentration.
- 2.8 EBT (or evidential breath testing device)** means an EBT approved by the National Highway Traffic Safety Administration (NHTSA) for the evidential testing of breath and placed on NHTSA's "Conforming Products List of Evidential Breath Measurement Devices" (CPL).
- 2.9 On duty** means being engaged in, or on-call to be engaged in, the performance of work responsibilities for the employer.
- 2.10 Refusal to submit to an alcohol test** means any of the following:
- (a) Failing to provide an adequate sample without an adequate medical explanation.
 - (b) Engaging in conduct that obstructs the testing process.
 - (c) Refusing to be tested.
- 2.11 Screening test (or initial test)** means an analytic procedure to determine whether an employee may have a prohibited concentration of alcohol in a breath specimen.

2.12 *Serious work accident* means an on-duty accident or incident resulting in death, or serious personal injury requiring immediate medical treatment, that arises out of any of the following:

- (a) The operation of a motor vehicle.
- (b) The discharge of a firearm.
- (c) A physical altercation.
- (d) The provision of direct health care services.
- (e) The handling of dangerous or hazardous materials.

3 ALCOHOL TESTING PROCEDURES

3.1 The Breath Alcohol Technician.

- (a) The breath alcohol technician (BAT) shall be trained to proficiency in the operation of the EBT to be used and in the alcohol testing procedures of this part.
 - (1) Proficiency shall be demonstrated by successful completion of a course of instruction which, at a minimum, provides training in the principles of EBT methodology, operation, and calibration checks; the fundamentals of breath analysis for alcohol content; and the procedures required in this part for obtaining a breath sample, and interpreting and recording EBT results.
 - (2) Only a course of instruction for operation of EBTs that is substantially equivalent to the Department of Transportation model course, as determined by the National Highway Traffic Safety Administration (NHTSA), may be used to train BATs to proficiency.
 - (3) The course of instruction shall provide documentation that the BAT has demonstrated competence in the operation of the specific EBT(s) to be used.
 - (4) Any BAT who will perform an external calibration check of an EBT shall be trained to proficiency in conducting the check on the particular model of EBT, to include practical experience and

demonstrated competence in preparing the breath alcohol simulator or alcohol standard, and in maintenance and calibration of the EBT.

(5) The BAT shall receive additional training, as needed, to ensure proficiency, concerning new or additional devices or changes in technology to be used.

(b) Law enforcement officers who have been certified by the state or a local unit of government to conduct breath alcohol testing are deemed to be qualified as BATs. In order for a test conducted by such an officer to be accepted under these regulations, the officer must have been certified to use the EBT that was used for the test.

3.2 Devices to be used for Breath Alcohol Tests.

(a) Only EBTs shall be used for screening tests. When an EBT that does not meet the requirements of paragraphs (b)(1) through (b)(3) of this section is used for a screening test, a logbook shall be used in conjunction with the EBT (see § 3.5(c)).

(b) For confirmation tests, EBTs must meet the following requirements:

(1) EBTs shall have the capability of providing, independently or by direct link to a separate printer, a printed result in triplicate (or three consecutive identical copies) of each breath test and of the operations specified in paragraphs (b)(2) and (b)(3) of this section.

(2) EBTs shall be capable of assigning a unique and sequential number to each completed test, with the number capable of being read by the BAT and the employee before each test and being printed out on each copy of the result.

(3) EBTs shall be capable of printing out, on each copy of the result, the manufacturer's name for the device, the device's serial number, and the time of the test.

(4) EBTs shall be able to distinguish alcohol from acetone at the **0.02** alcohol concentration level.

(5) EBTs shall be capable of the following operations:

(i) Testing an air blank prior to each collection of breath.

- (ii) Performing an external calibration check.

3.3 Quality Assurance Plans for EBTs.

- (a) In order to be used in either screening or confirmation alcohol testing subject to this part, an EBT shall have a quality assurance plan (QAP) developed by the manufacturer.
 - (1) The plan shall designate the method or methods to be used to perform external calibration checks of the device, using only calibration devices on the NHTSA "Conforming Products List of Calibrating Units for Breath Alcohol Tests."
 - (2) The plan shall specify the minimum intervals for performing external calibration checks of the device. Intervals shall be specified for different frequencies of use; environmental conditions (e.g., temperature, altitude, humidity); and contexts of operation (e.g., stationary or mobile use).
 - (3) The plan shall specify the tolerances on an external calibration check within which the EBT is regarded to be in proper calibration.
 - (4) The plan shall specify inspection, maintenance, and calibration requirements and intervals for the device.
 - (5) For a plan to be regarded as valid, the manufacturer shall have submitted the plan to NHTSA for review and have received NHTSA approval of the plan.
- (b) The test site administrator shall comply with the NHTSA-approved quality assurance plan for each EBT it uses for alcohol screening or confirmation testing subject to this part.
 - (1) The test site administrator shall ensure that external calibration checks of each EBT are performed as provided in the QAP.
 - (2) The test site administrator shall take an EBT out of service if any external calibration check results in a reading outside the tolerances for the EBT set forth in the QAP. The EBT shall not again be used for alcohol testing under this part until it has been serviced and has

had an external calibration check resulting in a reading within the tolerances for the EBT.

- (3) The test site administrator shall ensure that inspection, maintenance, and calibration of each EBT are performed by the manufacturer or a maintenance representative certified by the device's manufacturer or a state health agency or other appropriate state agency. The test site administrator shall also ensure that each BAT or other individual who performs an external calibration check of an EBT used for alcohol testing subject to this part has demonstrated proficiency in conducting such a check of the model of EBT in question.
- (4) The test site administrator shall maintain records of the external calibration checks of EBTs as provided in § 3.13.
- (c) When not using the EBT at an alcohol testing site, the test site administrator shall store the EBT in a secure space.

3.4 Locations for Breath Alcohol Testing.

- (a) Alcohol testing shall be conducted in a location that affords visual and aural privacy to the individual being tested, sufficient to prevent unauthorized persons from seeing or hearing test results. All necessary equipment, personnel, and materials for breath testing shall be provided at the location where testing is conducted.
- (b) A mobile collection facility (e.g., a van equipped for alcohol testing) that meets the requirements of paragraph (a) of this section may be used.
- (c) No unauthorized persons shall be permitted access to the testing location when the EBT remains unsecured or, in order to prevent such persons from seeing or hearing a testing result, at any time when testing is being conducted.
- (d) In unusual circumstances (e.g., when it is essential to conduct a test outdoors at the scene of an accident), a test may be conducted at a location that does not fully meet the requirements of paragraph (a) of this section. In such a case, the BAT shall provide visual and aural privacy to the employee to the greatest extent practicable.

- (e) The BAT shall supervise only one employee's use of the EBT at a time. The BAT shall not leave the alcohol testing location while the testing procedure for a given employee (see §§ 3.6 through 3.8) is in progress.

3.5 The Breath Alcohol Testing Form and Log Book.

- (a) A breath alcohol testing form prescribed by the state personnel director shall be used. Appointing authorities may not modify or revise this form, except that a form directly generated by an EBT may omit the space for affixing a separate printed result to the form.
- (b) The form shall provide triplicate (or three consecutive identical) copies. Copy 1 shall be retained by the BAT. Copy 2 shall be provided to the employee. Copy 3 shall be transmitted to the program administrator. Except for a form generated by an EBT, the form shall be 8 1/2 by 11 inches in size.
- (c) A logbook shall be used in conjunction with any EBT used for screening tests if the EBT does not meet the requirements of §3.2(b)(1) through (b)(3). There shall be a log book for each such device that is not used in conjunction with any other device and that is used to record every test conducted on the device. The log book shall include columns for the test number, date of the test, name of the BAT, location of the test, quantified test result, and initials of the employee taking each test.

3.6 Preparation for Breath Alcohol Testing.

- (a) When the employee enters the alcohol testing location, the BAT will require the employee to provide positive identification (e.g., through use of a photo I.D. card or identification by an appointing authority representative). On request by the employee, the BAT shall provide positive identification to the employee.
- (b) The BAT shall explain the testing procedure to the employee.

3.7 Procedures for Screening Tests.

- (a) The BAT shall complete Step 1 on the Breath Alcohol Testing Form. The employee shall then complete Step 2 on the form, signing the certification. Refusal by the employee to sign this certification shall be regarded as a refusal to take the test.

- (b) An individually sealed mouthpiece shall be opened in view of the employee and BAT and attached to the EBT in accordance with the manufacturer's instructions.
- (c) The BAT shall instruct the employee to blow forcefully into the mouthpiece for at least 6 seconds or until the EBT indicates that an adequate amount of breath has been obtained.
- (d) —
 - (1) If the EBT does not meet the requirements of § 3.2(b)(1) through (3), the BAT and the employee shall take the following steps:
 - (i) Show the employee the result displayed on the EBT. The BAT shall record the displayed result, test number, testing device, serial number of the testing device, time and quantified result in Step 3 of the form.
 - (ii) Record the test number, date of the test, name of the BAT, location, and quantified test result in the logbook. The employee shall initial the log book entry.
 - (2) If the EBT provides a printed result, but does not print the results directly onto the form, the BAT shall show the employee the result displayed on the EBT. The BAT shall then affix the test result print-out to the breath alcohol test form in the designated space, using a method that will provide clear evidence of removal (e.g., tamper-evident tape).
 - (3) If the EBT prints the test results directly onto the form, the BAT shall show the employee the result displayed on the EBT.
- (e) —
 - (1) In any case in which the result of the screening test is a breath alcohol concentration of less than **0.02**, the BAT shall date the form and sign the certification in Step 3 of the form. The employee shall sign the certification and fill in the date in Step 4 of the form.
 - (2) If the employee does not sign the certification in Step 4 of the form or does not initial the log book entry for a test, it shall not be consid-

ered a refusal to be tested. In this event, the BAT shall note the employee's failure to sign or initial in the "Remarks" section of the form.

- (3) If a test result printed by the EBT (see paragraph (d)(2) or (d)(3) of this section) does not match the displayed result, the BAT shall note the disparity in the remarks section. Both the employee and the BAT shall initial or sign the notation. In accordance with § 3.11, the test is invalid and the appointing authority and employee shall be so advised.
- (4) No further testing is authorized. The BAT shall transmit the result of less than 0.02 to the appointing authority in a confidential manner, and the appointing authority shall receive and store the information so as to ensure that confidentiality is maintained as required by § 3.12.
- (f) If the result of the screening test is an alcohol concentration of **0.02 or greater**, a confirmation test shall be performed as provided in § 3.8.
- (g) If the confirmation test will be conducted by a different BAT, the BAT who conducts the screening test shall complete and sign the form and log book entry. The BAT will provide the employee with Copy 2 of the form.

3.8 Procedures for Confirmation Tests.

- (a) If a BAT other than the one who conducted the screening test is conducting the confirmation test, the new BAT shall follow the procedures of § 3.6.
- (b) The BAT shall instruct the employee not to eat, drink, put any object or substance in his or her mouth, and, to the extent possible, not belch during a waiting period before the confirmation test. This time period begins with the completion of the screening test, and shall not be less than 15 minutes. The confirmation test shall be conducted within 20 minutes of the completion of the screening test. The BAT shall explain to the employee the reason for this requirement (i.e., to prevent any accumulation of mouth alcohol leading to an artificially high reading) and the fact that it is for the employee's benefit. The BAT shall also explain that the test will be conducted at the end of the waiting period, even if the employee has disregarded the instruction. If the BAT becomes aware that the employee has not complied with this instruction, the BAT shall so note in the "Remarks" section of the form.

(c) —

(1) If a BAT other than the one who conducted the screening test is conducting the confirmation test, the new BAT shall initiate a new Breath Alcohol Testing form. The BAT shall complete Step 1 on the form. The employee shall then complete Step 2 on the form, signing the certification. Refusal by the employee to sign this certification shall be regarded as a refusal to take the test. The BAT shall note in the "Remarks" section of the form that a different BAT conducted the screening test.

(2) In all cases, the procedures of § 3.7(a), (b), and (c) shall be followed. A new mouthpiece shall be used for the confirmation test.

(d) Before the confirmation test is administered for each employee, the BAT shall ensure that the EBT registers **0.00** on an air blank. If the reading is greater than 0.00, the BAT shall conduct one more air blank. If the reading is greater than 0.00, testing shall not proceed using that instrument. However, testing may proceed on another instrument.

(e) Any EBT taken out of service because of failure to perform an air blank accurately shall not be used for testing until a check of external calibration is conducted and the EBT is found to be within tolerance limits.

(f) In the event that the screening and confirmation test results are not identical, the confirmation test result is deemed to be the final result upon which any action under operating administration rules shall be based.

(g) —

(1) If the EBT provides a printed result, but does not print the results directly onto the form, the BAT shall show the employee the result displayed on the EBT. The BAT shall then affix the test result print-out to the breath alcohol test form in the designated space, using a method that will provide clear evidence of removal (e.g., tamper-evident tape).

(2) If the EBT prints the test results directly onto the form, the BAT shall show the employee the result displayed on the EBT.

(h) —

- (1) Following the completion of the test, the BAT and the employee shall date the form and sign the certification.
 - (2) If the employee does not sign the certification in Step 4 of the form or does not initial the log book entry for a test, it shall not be considered a refusal to be tested. In this event, the BAT shall note the employee's failure to sign or initial in the "Remarks" section of the form.
 - (3) If a test result printed by the EBT (see paragraph (g)(1) or (g)(2) of this section) does not match the displayed result, the BAT shall note the disparity in the remarks section. Both the employee and the BAT shall initial or sign the notation. In accordance with § 3.11, the test is invalid and the appointing authority and employee shall be so advised.
 - (4) The BAT shall conduct an air blank. If the reading is greater than **0.00**, the test is invalid.
- (i) The BAT shall transmit all results in a confidential manner.
- (1) Each appointing authority shall designate one or more appointing authority representatives for the purpose of receiving and handling alcohol testing results in a confidential manner. All communications by BATs to the appointing authority concerning the alcohol testing results of employees shall be to a designated appointing authority representative.
 - (2) Such transmission may be in writing, in person or by telephone or electronic means, but the BAT shall ensure immediate transmission to the appointing authority of results that require the appointing authority to prevent the employee from performing in a test-designated position.
 - (3) If the initial transmission is not in writing (e.g., by telephone), the appointing authority shall establish a mechanism to verify the identity of the BAT providing the information.
 - (4) If the initial transmission is not in writing, the BAT shall follow the initial transmission by providing to the appointing authority the appointing authority's copy of the breath alcohol testing form. The

appointing authority shall store the information so as to ensure that confidentiality is maintained as required by § 3.12.

3.9 Refusals to Test and Uncompleted Tests.

- (a) Refusal by an employee to complete and sign the breath alcohol testing form (Step 2), to provide breath, to provide an adequate amount of breath, or otherwise to cooperate with the testing process in a way that prevents the completion of the test, shall be noted by the BAT in the remarks section of the form. The testing process shall be terminated and the BAT shall immediately notify the appointing authority.
- (b) If a screening or confirmation test cannot be completed, or if an event occurs that would invalidate the test, the BAT shall, if practicable, begin a new screening or confirmation test, as applicable, using a new breath alcohol testing form with a new sequential test number (in the case of a screening test conducted on an EBT that meets the requirements of § 3.2(b) or in the case of a confirmation test).

3.10 Inability to Provide an Adequate Amount of Breath.

- (a) This section sets forth procedures to be followed in any case in which an employee is unable, or alleges to be unable, to provide an amount of breath sufficient to permit a valid breath test because of a medical condition.
- (b) The BAT shall again instruct the employee to attempt to provide an adequate amount of breath. If the employee refuses to make the attempt, the BAT shall immediately inform the appointing authority.
- (c) If the employee attempts and fails to provide an adequate amount of breath, the BAT shall so note in the "Remarks" section of the breath alcohol testing form and immediately inform the appointing authority.
- (d) If the employee attempts and fails to provide an adequate amount of breath, the appointing authority shall direct the employee to obtain, as soon as practical after the attempted provision of breath, an evaluation from a licensed physician who is acceptable to the appointing authority concerning the employee's medical ability to provide an adequate amount of breath.
 - (1) If the physician determines, in the physician's reasonable medical judgment, that a medical condition has, or with a high degree of

probability, could have, precluded the employee from providing an adequate amount of breath, the employee's failure to provide an adequate amount of breath shall not be deemed a refusal to take a test. The physician shall provide to the appointing authority a written statement of the basis for the conclusion.

- (2) If the licensed physician, in the physician's reasonable medical judgment, is unable to make the determination set forth in paragraph (a) of this section, the employee's failure to provide an adequate amount of breath shall be regarded as a refusal to take a test. The licensed physician shall provide a written statement of the basis for the conclusion to the appointing authority.

3.11 Invalid Tests. A breath alcohol test shall be invalid under the following circumstances:

- (a) The next external calibration check of an EBT produces a result that differs by more than the tolerance stated in the QAP from the known value of the test standard. In this event, every test result of **0.02** or above obtained on the device since the last valid external calibration check shall be invalid.
- (b) The BAT does not observe the minimum 15-minute waiting period prior to the confirmation test, as provided in § 3.8(b).
- (c) The BAT does not perform an air blank of the EBT before a confirmation test, or an air blank does not result in a reading of 0.00 prior to or after the administration of the test, as provided in § 3.8.
- (d) The BAT does not sign the form as required by §§ 3.7 and 3.8.
- (e) The BAT has failed to note on the remarks section of the form that the employee has failed or refused to sign the form following the recording or printing on or attachment to the form of the test result.
- (f) An EBT fails to print a confirmation test result.
- (g) On a confirmation test and, where applicable, on a screening test, the sequential test number or alcohol concentration displayed on the EBT is not the same as the sequential test number or alcohol concentration on the printed result.

3.12 Availability and Disclosure of Alcohol Testing Information about Individual Employees.

- (a) Appointing authorities shall maintain records in a secure manner, so that disclosure of information to unauthorized persons does not occur.
- (b) Except as required by law or expressly authorized or required in this section, no appointing authority shall release employee information that is contained in the records required to be maintained by rule 2-7 or these regulations.
- (c) An employee subject to testing is entitled, upon written request, to obtain copies of any records pertaining to the employee's use of alcohol, including any records pertaining to his or her alcohol tests. The appointing authority shall promptly provide the records requested by the employee. Access to an employee's records shall not be contingent upon payment for records other than those specifically requested.
- (d) When requested by the state personnel director, each appointing authority shall make available copies of all results for appointing authority alcohol testing conducted under the requirements of this regulation and any other information pertaining to the appointing authority's alcohol misuse prevention program. The information shall include name-specific alcohol test results, records, and reports.
- (e) An appointing authority shall make records available to a subsequent appointing authority upon receipt of a written request from an employee. Disclosure by the subsequent appointing authority is permitted only as expressly authorized by the terms of the employee's written request.
- (f) An appointing authority may disclose information required to be maintained under this regulation pertaining to an employee to that employee or to the decision maker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual, and arising from the results of an alcohol test administered under the requirements of this regulation, or from the appointing authority's determination that the employee engaged in prohibited conduct (including, but not limited to, a worker's compensation, unemployment compensation, or other proceeding relating to a benefit sought by the employee).
- (g) An appointing authority shall release information regarding an employee's records as directed by the specific, written consent of the

employee authorizing release of the information to an identified person. Release of such information is permitted only in accordance with the terms of the employee's consent.

3.13 Maintenance and Disclosure of Records concerning EBTs and BATs.

- (a)** Each test site administrator shall maintain the following records for two years:
 - (1)** Records of the inspection and maintenance of each EBT used in employee testing;
 - (2)** Documentation of compliance with the QAP for each EBT it uses for alcohol testing under this part;
 - (3)** Records of the training and proficiency testing of each BAT used in employee testing;
 - (4)** The logbooks required by § 3.5(c).
- (b)** Each test site administrator shall maintain for five years, records pertaining to the calibration of each EBT used in alcohol testing under this part, including records of the results of external calibration checks.
- (c)** Records required to be maintained by this section shall be disclosed on the same basis as provided in § 3.12.

4 PROHIBITED LEVELS OF ALCOHOL AND PENALTIES

- 4.1 Prohibited Levels of Alcohol.** It is a violation of civil service rule 2-7.1(b) for an employee to report to duty or to be on duty with a breath alcohol concentration equal to or greater than **0.02**. A confirmatory test result equal to or greater than **0.02** shall constitute just cause for the appointing authority to discipline the employee.
- 4.2 Discipline.** The appointing authority shall specify, in writing, the penalty or penalties that may be imposed for a violation of civil service rule 2-7. However, an appointing authority shall immediately remove a test-designated employee from the employee's duties if the test reveals a prohibited level of alcohol or the employee otherwise violates rule 2-7.1.

5 EDUCATION AND TRAINING

5.1 Required Employee Education and Training. All employees subject to civil service rule 2-7 shall be provided with educational materials that explain the state's policies and procedures with respect to meeting these requirements. This information is to be distributed to each covered employee before the start of testing under rule 2-7. The required content of this material must include:

- (a) The identity of the person designated by the employer to answer questions about the educational materials.
- (b) Which employees are subject to these regulations, including which employees are in test-designated positions.
- (c) Sufficient information to explain what the term "test-designated position" means.
- (d) Specific information to explain what is prohibited by these regulations.
- (e) The circumstances under which employees will be tested for alcohol.
- (f) The penalties or other consequences for an employee found to have violated provisions of civil service rule 2-7.
- (g) The procedures which will be used to test employees for alcohol, and the procedures in place to protect the employees and ensure the integrity of the testing process, safeguard the validity of the test results, and ensure that those test results are attributed to the correct employee.
- (h) An explanation of the requirement that employees must submit to testing in accordance with these regulations.
- (i) An explanation of what constitutes a refusal to submit and what penalties may be incurred for failure to submit to testing.
- (j) Information concerning the effects of alcohol use on an employee's health, work, and personal life; signs and symptoms of an alcohol

abuse problem; and methods for an employee to obtain assistance if an alcohol abuse problem is suspected.

- 5.2 Supervisory Education and Training.** In addition to the information provided to covered employees, supervisors shall be provided with training on alcohol abuse to enable them to determine when an employee should be required to submit to a reasonable suspicion test for alcohol. Such training shall include the physical, behavioral, speech, and performance indicators of probable use of alcohol.

CONTACT

Questions regarding this regulation should be directed to the Office of the General Counsel, Department of Civil Service, P.O. Box 30002, 400 South Pine Street, Lansing, Michigan 48909, (517) 373-3024.

NOTE: Regulations are issued by the State Personnel Director under authority granted in the State of Michigan *Constitution* and the *Michigan Civil Service Commission Rules*. Regulations that implement Commission Rules are subordinate to those Rules.